location allowance to which he said he was entitled under the ITM service scheme. He also alleged his transfer claim amounting to RM4,000 was not paid. Instead he was only paid RM400. As regards the special location allowance, the plaintiff was considered as originally recruited in Sabah to serve in Sabah and therefore he was not entitled to allowance pursuant to Clause 3.1 of Service Circular Bil. 1 of 1980. He was only entitled to regional allowance at that time and he was paid the regional allowance. As regards his transfer claim, he had not produced any evidence to support his claim for RM4,000. Both the claims are to my mind rightly rejected by the defendant.

For the above reasons the action of the plaintiff is dismissed with costs.

TAN KAH SENG & ANOR.

v.

CHI LIUNG HOLDINGS SDN. BHD.

HIGH COURT, SHAH ALAM
DATO' MAHADEV SHANKER J.
[CIVIL APPEAL NO. 11-4-91]
22 JUNE 1992

PRACTICE AND PROCEDURE: Summary Judgment - Application under O. 26A Subordinate Courts Rules 1980 - Supporting affidavit - Deponents averred on the advice of their Solicitor that they believed that there was no defence - Sufficiency of affidavit - Whether sufficient to depose that they believed in somebody else's belief that there was no defence even if that somebody was their own Solicitor.

The plaintiffs had applied for summary judgment in the Magistrate's Court under O. 26A of the Subordinate Courts Rules 1980 (SCR). Their supporting affidavit, *inter alia* contained the following averment: "We have been advised by our Solicitor whose advice we verily believe that the defendant has no defence..."

At the trial court, defence Counsel objected to the sufficiency of this affidavit. He contended that it was mandatory that the plaintiffs should aver that it was their belief that there was no defence. It was not enough for them to depose that they believed in somebody else's belief that there was no defence even if that somebody else was their own solicitor.

The learned Magistrate dismissed the application and the plaintiff appealed.

Held:

[1] The core issue in an application for summary judgment is whether the defendant has shown that he has an arguable defence and not whether the plaintiff has used some rigid form of words to say that he has not as justice is concerned not so much with the form but with the substance.

[2] Order 26A r. 2(2) of the SCR permits affidavits in support of the application for summary judgment to contain statements of information or belief with the sources and grounds thereof unless the court directs otherwise.

[3] Further, O.26A r.2(1) does not require that the affidavit in support of the application

for summary judgment must be made by the plaintiff himself. The affidavit may be made by the plaintiff or any person duly authorised to make it provided he is a responsible person e.g. a solicitor's clerk.

[4] The Court was unable to see any material difference between a situation where a litigant states on the advice of his solicitor that he believes there is no defence and a deposition by the solicitor himself on the instructions that he has received that he believes there is no defence.

[Appeal allowed with costs to be taxed and paid by the defendants to the plaintiffs.]

(**Editor's Note:** The parties in Summon No. 72-289-89 (Rayuan Sivil 33/89) had agreed to be bound by the Court's decision in this case and both the appeals were therefore heard together).

Cases referred:
Tan Tik Sing v. Gomez Devpt. Co. Sdn. Bhd. [1979] 2 MLJ 79 ***(refd)***
Pasangan Trading (M) Sdn. Bhd. v. Pembinaan Kin Leik Sdn. Bhd. (unrep) ***(refd)***
Symon & Co. v. Palmer's Stores (1903) Ltd. [1912] 1 KB 259 ***(refd)***
M. Pocock v. ADAC Ltd. [1952] 1 TLR 29 ***(refd)***

Legislation referred to:
Subordinate Courts Rule 1980 O. 26A, r. 2(1)(2)
Rules of the High Court 1980 O. 14 r. 2(2), O. 25 r. 26(2), O. 41 r. 5(2)

Other source referred to:
Subordinate Courts Practice 1981 by K.S. Dass and Abdul Hamid bin Hj. Muhamed

For the plaintiff - S.K. Liow; M/s. Nik Hussain & Partners, Kuala Lumpur
For the defendant - G.T. Rajan; M/s. G.T. Rajan & Co., Kelang

JUDGMENT

Mahadev Shanker J:
As there were common questions of law and facts in both the Magistrate's Court cases the parties in summons No. 72-289-89 (Rayuan Sivil 33/89) agreed to be bound by the Court's decision in summons 72-289-89 (Rayuan Sivil 32/89) and these two appeals were therefore heard together.

The plaintiffs applied for summary judgment in the Court below under the provisions of O. 26A of the Subordinate Courts Rules 1980 (SCR). This is the equivalent of O. 14 of the Rules of the High Court 1980 (RHC). Except for a difference in the form number required to be used, O. 26A r.2 and O. 14 r. 2 are identically worded as are the forms provided.

In support of their application the plaintiffs swore an affidavit in which they averred that, "the defendant is and was at the commencement of the action justly and truly indebted to the plaintiffs for the sum claimed." This was followed by the material facts upon which they relied in support of their claim. They ended up their affidavit deposing as follows:

> We have been advised by our Solicitors whose advise we verily believe that the defendant has no defence to this case and the said defence is a bare denial filed to delay the plaintiffs from obtaining satisfaction of a debt rightfully owing to them.

Before the learned Magistrate, Counsel for the Defendant took a preliminary objection on the sufficiency of this affidavit. He contended that it was mandatory that the plaintiffs should aver that it was their belief that there was no defence. He said that it was not enough for them to depose that they believed in somebody else's belief that there was no defence even if that somebody else was their own Solicitor. The learned Magistrate agreed and dismissed the application.

The judicial reasoning which now follows may show whether Counsel's submission was based on an obtuse reading of the commentary on the **Rule in Subordinate Courts Practice 1981** by K.S. Dass and Abdul Hamid bin Hj. Mohamed at p. 418 where there is an extract of what Y.A. Ajaib Singh J. said in *Tan Tik Sing v. Gomez Devpt. Co. Sdn. Bhd.* [1979] 2 MLJ 79 at p.80.

The learned Judge there stated that it was incumbent upon the plaintiff to state that in his belief there was no defence to the action, and this emphasis was added by defence Counsel to produce the result that it was not enough for the plaintiff to rely upon somebody else's belief to that effect.

I had already dealt with the objectives of the supporting affidavit to O. 14 applications in my judgment in *Pasangan Trading (M) Sdn. Bhd. v. Pembinaan Kin Leik Sdn. Bhd. K.L.* High Court 24-C38-86 (Unrep.) where I distinguished *Hagemeyer Trading Company (M) Sdn. Bhd. v. Gibson Trading Co. & Anor.* [1982] 1 MLJ 301.

Justice is concerned not so much with the form but with the substance, and the core issue in an application for summary judgment is whether the defendant has shown that he has an arguable defence and not whether the plaintiff has used some rigid form of words to say that he has not.

In the present case I regret to say that whilst the reading be defence Counsel of the two paras in *Tan Tik Sing v. Gomez Dvpt. Co. Sdn. Bhd.* was technically correct the emphasis placed on the possessive pronoun produced a totally distorted result which cannot be reconciled with the decision or as will shortly be seen with the Rules.

I agree with Counsel for the appellant that this case can only be properly understood when we bear in mind what Y.A. Ajaib Singh said at p. 79 in *Tan Tik Sing (supra)* before he reached the passage quoted by defence Counsel. It reads:

> But nowhere in the affidavit in support of his application for summary judgment nor in his further affidavit in reply to the defendant's affidavit did the plaintiff state that in his belief there was no defence to the action.

A cursory reading of the next para in that judgment shows that Gomez Dvpt. in its affidavit had raised a bona fide defence which raised triable issues.

The need to state the plaintiff's belief that there is no defence to the claim arises because it is abuse of process to use the summary procedure for an ulterior purpose. This would be the case for example when the plaintiff knows that there is an arguable defence but nevertheless files the application just to compel the defendant to make his defence on oath in his affidavit in opposition to summary judgment: See *Symon & Co. v. Palmer's Stores [1903] Ltd.* [1912] 1 KB 259. Such improper application should be penalised with an appropriate order as to costs: See *M. Pocock v. ADAC Ltd.* [1952] 1 TLR 29 at 34.

As to making statements of belief in an affidavit it is a matter for regret that the parties did not direct the learned Magistrate to O. 26A r. 2(2) of the SCR (O. 14 r. 2(2) of the RHC) which specifically permits affidavits for this purpose to contain statements of information or belief with the sources and grounds thereof, unless the Court directs otherwise (cf. O. 25 r. 26(2) SCR and O. 41 r. 5(2) of the RHC)

It needs to be emphasised that nowhere in O. 26A r. (2)(1) does it provide that the affidavit in support of the application for summary judgment must be made by the plaintiff himself. The affidavit may be made by the plaintiff or any person duly authorised to make it provided he is a responsible person e.g. a solicitor's clerk: See Commentary in the **Supreme Court Practice** 1979(1) at para 14/2/4.

A plaintiff must be guided by his Solicitors whether all the circumstances of the case as disclosed add up to an arguable defence, especially where question of law or interpretation are involved. With respect to the defence Counsel Court is unable to see any material difference between a situation where a litigant states on the advice of his Solicitor that he believes there is no defence and a deposition by the Solicitor himself on the instructions that he has received that he believes there is no defence. Once issue is joined it will be the finding of the Court on the point which matters.

I therefore reiterate that this appeal No. 32/89 is allowed with costs to be taxed and paid by the defendants to the plaintiff. Since the parties in Appeal No. 33/89 agreed to be bound by the result this appeal is also allowed but as the appeals were heard together there will only be one set of costs.